IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.4690 OF 2005

Rajendra Prabhudas Kalapi and another).. Petitioners

Versus

Mrs.Nimmi V. Vazirani and another).. Respondents

Mr.Vinit Naik with Mr.Bharat Joshi for the Petitioners.

Mr.M.S. Doctor for Respondent Nos.1, 2, 3 and 5.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 6TH SEPTEMBER 2005

P.C. :

. This Petition challenges the order passed by the trial Court discharging the Notice taken out by the Petitioner for filing his Written Statement beyond the period prescribed under Civil Procedure Code. Undisputedly, a writ of summons was served on 21st October 2004 on the Petitioner. The returnable date was 2nd December 2004. On 2nd March 2005 the Advocate for the Petitioner filed his Vakalatnama and sought an adjournment to file Written Statement. On 16th March 2005, the Advocate for the Petitioner appeared and presented Interim Notice No.1006 of 2005 along with the Written Statement and sought permission to file the Written Statement. The trial Court by its order dated 11th June 2005 has discharged the Notice by concluding

that the Petitioner was not able to make out exceptional circumstances for filing the Written Statement beyond the period of ninety days after being served with the writ of summons.

2. The learned Advocate for the Petitioner submits that the Petitioner was unable to file the Written Statement within the stipulated time because the Plaintiff i.e. the Respondent herein had relied on the record and proceedings in RAD Suit No.5300 of 1967 and had not furnished copies of the same to the Petitioner. It is submitted that the only document which was annexed to the Plaint was a decree and since the Petitioner had become a tenant of he suit premises only in 2000, it was necessary for him to understand what were the earlier proceedings to which his predecessor was not a party. It is in these circumstances that there is a delay caused in filing the Written Statement. The learned Advocate submits that calculating the 90 days period either from 21st October 2004 when the writ of summons was served or from the returnable date, will indicate that there has been no inordinate delay which cannot be condoned. In such circumstances, the learned Advocate submits that at best the Petitioner ought to have been saddled with costs rather than shutting his defence from the proceedings.

3. The learned Advocate for Respondent No.1 submits that this is a specious plea raised by the Petitioner for not filing the Written Statement within the stipulated time. The Petitioner's Advocate ought to have called upon the Respondents to furnish the proceedings rather than waiting for the time to lapse. The learned Advocate submits that there is not even a letter indicating that the Petitioner had in fact called upon the Respondents to furnish the proceedings. He relies on the judgment of the learned Single Judge of this Court in *Shailaja A. Sawant (Dr.)* vs. *Sayajirao Ganpatrao Patil,* **Writ Petition Nos.2169, 6627, 7247, 7340 and 8295 of 2003**, wherein it has been held thus :-

> "... The grounds, such as the advocate was not available, ignorance of law, the relevant documents were not available or any such ground, which could be termed as frivolous, cannot be a ground for the Court to exercise powers vested in it under the provisions of Rules 1, 9 and 10 of Order 8 for extending time for filing a written statement beyond the period prescribed under Rule 1 Order 8, Civil Procedure Code."

4. In my view, this judgment will have no application. The reason "the relevant documents were not made available" referred to in the above judgment would be termed as frivolous if a Defendant seeks time to file Written Statement beyond the stipulated time when he is in possession of these documents or he has

reasonable access to such documents. In the present case, the documents which the Petitioner was seeking were the record and proceedings of RAE Suit No.5300/67, to which the Petitioners were not parties. The Respondent No.1 has specifically relied on the same in her Plaint. The Petitioner's explanation for not filing the Written Statement within the stipulated time is plausible, sufficient and reasonable. Exceptional circumstances have been made out by the Petitioner. However, there is no doubt that there has been albeit only of 53 days. In these circumstances, in my view, the Petitioner can be directed to compensate the Respondent by payment of costs.

5. Writ Petition allowed. Interim Notice is made absolute. The Written Statement of the Petitioner shall be taken on record subject to payment of costs quantified at Rs.3,000/- (Rupees Three thousand only). The Petitioner to approach the trial Court within two weeks from today.